89-1140

No.: _____

IN THE

Supreme Court of the United States

October Term, 1989

IN RE: GRAND JURY SUBPOENA
SERVED ON JOHN DOE

JOHN DOE, A GRAND JURY WITNESS,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Under Title III (18 U.S.C. Section 2510 et. seq.), does a Judge have authority to order electronic surveillance to gather evidence of offenses "non-designated" by the statute?

2. Under Title III, does a Judge have authority, in an Amending/Expansion Order, to order electronic surveillance of "non-designated" offenses?

3. Under Title III, can a State Court Judge authorize, in an original or in an Amending/Expansion Order, electronic surveillance of "non-designated" offenses for use in Federal proceedings?

4. Was the Surveillance Documentation herein facially valid?

List of Parties

Apart from the party named in the caption of this Petition, no other parties were involved in this matter.

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Petitioner, JOHN DOE, petitions for a Writ of Certiorari to review the Order of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The Opinion of the Court of Appeals is as yet unreported but appears in the appendix, *infra,* at pp. 1a-12a. The Memorandum and Orders of the District Court are unreported and appear in the appendix *infra,* at pp. 15a-17a.

JURISDICTION

The Order of the Second Circuit Court of Appeals was entered on September 18, 1989. The Opinion was subsequently filed on November 8, 1989. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTORY PROVISIONS INVOLVED

The Statute involved herein is Title III of the Omnibus Crime Control and Safe Street Act, 1968 18 U.S.C. 2510, et.seq. The sections specifically involved herein are 18 U.S.C. 2515, 18 U.S.C. 2516, 18 U.S.C. 2517, and 18 U.S.C. 2518.

The aforecited sections are lengthy; their text is set forth in the appendix *infra* at pp. 20a-35a.

STATEMENT

Title III of the Omnibus Crime Control and Safe Street Act, 1968 (hereinafter Title III) is dead in the Second Circuit. By its opinion in the instant case, the Second Circuit Court of Appeals has totally abrogated the carefully crafted protections of Title III, sanctioning instead, electronic surveillance of

communications to gather evidence of *any crime* regardless of whether a "designated offense" or not under 18 U.S.C. 2516.

The abrogation of the designated offense restrictions of Title III - which Congress specifically enacted to safeguard the privacy of innocent citizens from impermissible and unnecessary intrusion - substantially imperils the cherished right of United States citizens of personal privacy guaranteed by the Fourth and Fourteenth Amendments of the Constitution.

The questions presented by this Petition for a Writ of Certiorari are quite simple and straightforward, despite being matters of apparent first impression in the Supreme Court.

The plain language of Title III (18 U.S.C. 2516, 2517), prohibits a Judge from issuing an order authorizing electronic surveillance to gather evidence of offenses not specifically designated in 18 U.S.C. 2516.

The Second Circuit Court of Appeals and the Government have acknowledged the correctness of the above proposition, suggesting, however, that upon a secondary Application to Amend or Expand an existing electronic surveillance order, *any* offense - whether designated under Title III or not - may be the proper subject of electronic surveillance.

To permit a Court to authorize electronic surveillance for non-designated offenses in an Amending/Expansion order totally nullifies the protections of Title III based merely on the timing of the Prosecuting Attorney in submitting an Application therefor.

By the above same reasoning, Title III does not permit a State Court Judge - as here - in an original or in an Amending/Expansion Order, to authorize surveillance to gather evidence of non-designated offenses for use in Federal proceedings.

In the instant case, Petitioner was held in contempt and

confined because he refused to answer questions propounded by a Special February 1988 New York Eastern District Grand Jury. His refusal was based on the grounds that the questions were the fruit of a facially defective electronic surveillance Order, in violation of Title III, and that the demanded testimony would be "disclosure" in further violation of Title III.

More specifically, Petitioner claimed not to be required to answer questions pertaining to the Evasion of Federal excise taxes, a crime clearly *not* designated by Title III (Section 2516) as the proper subject of either an original Order authorizing electronic surveillance or of an Expansion/Amendment Order.

A detailed chronology of the facts material to this Court's consideration of the questions presented follows.

A. Jurisdiction

The Memorandum and Order of the District Court denying Petitioner's Motion to Quash a Special Grand Jury Subpoena was entered on August 4, 1989. The District Court's Judgment of Contempt and Commitment was entered on August 16, 1989. The Jurisdiction of the District Court was invoked under 28 U.S.C. 1826.

The Jurisdiction of the Second Circuit Court of Appeals was invoked under 18 U.S.C. 1291 and 18 U.S.C. 1826.

B. Background

On August 2, 1985, upon Application of the Long Island Gas & Oil Industry Task Force (TASK FORCE), Suffolk County Court Judge Kenneth Rohl authorized electronic surveillance of the Suffolk County business office of one Sheldon Levine. The Order authorized interceptions of commu-

nications concerning theft of New York sales and excise taxes. Judge Rohl thereafter extended this Order several times.

The original Application with its supporting documentation (pp. 36a-42a), specifically "avowed" that the TASK FORCE necessarily would intercept conversations pertaining to the theft and evasion of Federal excise fuel taxes as well as State and local fuel taxes. However, no request for authorization to surveil for the Federal excise tax offenses was originally requested of Judge Rohl.

Parenthetically, had such request been typed into the Application or Order, such would have patently been impermissible and would have been denied out of hand.

On November 8, 1985, however, a renewal Application supported jointly by the Federal Organized Crime Strike Force and the New York Attorney General, was submitted to State Court Judge Rohl, now requesting authorization to surveil for evidence of the Federal crimes involving failure to pay Federal excise taxes.

Judge Rohl signed an Order amending and expanding the original Surveillance Order, now purporting to permit use and disclosure in any United States Court or Federal Grand Jury proceeding of intercepted communications relating to the nondesignated Federal offenses of evasion or failure to collect, and failure to pay Federal excise taxes on the sale of motor fuel products.

Petitioner was allegedly intercepted on or about November 21, 1985, during conversations at the office of Levine concerning Federal excise taxes.

A subpoena was issued to Petitioner, as a witness, by the Special February 1988 New York Eastern District Grand Jury on September 25, 1988.

In November 1988, Petitioner was Ordered to Show Cause why he should not be compelled to testify.

In December 1988, Petitioner, who suffers from chronic obstructive pulmonary disorder, heart failure, acute bronchial asthma, hypertension, and sleep apnea, was ordered by District Judge Wexler to submit to a physical examination for the purpose of determining whether he was physically capable of testifying before the Grand Jury. The examination was conducted by a Government-appointed doctor on December 7, 1988.

A hearing to determine if Petitioner was physically capable of testifying was delayed due to the ill health and repeated hospitalization of Petitioner.

On June 29, 1989 and July 20, 1989, testimony was taken before District Court Judge Wexler to determine Petitioner's physical capacity to testify. On July 20, 1989, Judge Wexler found Petitioner was physically able and directed him to testify.

C. Motion To Quash

Meanwhile, on May 16, 1989, Petitioner had moved to quash the Grand Jury's subpoena on the grounds that Judge Rohl's Expansion/Amendment Surveillance Order impermissibly authorized electronic surveillance for Federal excise tax offenses which were clearly not enumerated in Section 2516.

On July 20, 1989, Judge Wexler permitted Petitioner's counsel the opportunity to submit a Supplemental Memorandum of Law on the question of the validity of the Eavesdropping Order. However, without even receiving an Answering Brief from the Government, Judge Wexler, on August 4, 1989, issued an Order denying Petitioner's Motion to Quash the Subpoena, founding his denial on the grounds that Petitioner was not entitled to a plenary hearing (pp. 15a-17a).

As aforementioned, Federal excise tax crimes are specifically not among the list of designated offenses under Title III Section 2516 for which an Eavesdropping Order may issue.

Indeed, and significantly, as aforesaid, both the Second Circuit Court of Appeals and the Government acknowledged that electronic surveillance is unauthorized by Title III in connection with Federal excise tax offenses.

The District Court, in denying Petitioner's Motion to Quash, relied, in part, upon a decision in *U.S. v. Levine,* 690 Fed. Supp. 1165 (E.D.N.Y. 1988). Yet, even in the *Levine* decision, that Court, too, acknowledged that electronic surveillance for Federal excise tax evasion was not permitted.

Both the Second Circuit and the *Levine* Court, held, however, that upon an amendment/expansion order, authorization for interception of non-designated offenses was permitted via "an (unspecified) apparent exception" to Title III. Such holding is directly contradicted by the plain language of Title III. The *Levine* decision was never appealed.

Title III, Section 2517 indicates plainly that a Federal Judge may not authorize the electronic interception of conversations relating to Federal excise taxes either in the first instance, or upon an Application for Amendment of an Original Authorization, as both the original application and amendment must comply with the statute.

Since Title III proscribes a Federal Judge from authorizing electronic surveillance for Federal excise tax offenses, surely a State Judge - as here - is totally without power or authority to expand the list of offenses designated in Title III in order to permit electronic surveillance to gather evidence for use in Federal proceedings.

The statutory impermissibility herein is, and was, facially apparent upon a cursory review of the Eavesdropping Documen-

tation and Judge Rohl's Order. A hearing was clearly not necessary for such a determination.

Neither the District Court Below, nor the Court in *Levine, supra,* held in their respective orders that they found the Eavesdropping Documentation to be facially valid.

On August 11, 1989, Petitioner moved for Reargument and Reconsideration of the August 4, 1989 Order on the grounds that the District Court did not specifically assess the validity of the original electronic authorization. Without even receiving Petitioner's Application, the District Court telephonically denied the Application for Reargument.

D. The Contempt and Commitment Proceedings

On August 16, 1989, prior to Petitioner's appearance before the Grand Jury, Judge Wexler issued a Compulsion Order to take effect if Petitioner refused to testify on the basis of his privilege against self-incrimination. Immunity of John Doe had previously been granted by the Government.

Petitioner, however, never invoked any Fifth Amendment privilege herein.

Rather, on August 16, 1989, Petitioner appeared before the Grand Jury and refused to answer questions propounded by the Grand Jury on the sole ground that the said questions were the result of tainted electronic surveillance impermissibly intercepted in violation of Title III, and that any information divulged would be "disclosure" in further violation of Title III. Petitioner further indicated that he wished to pursue and exhaust the legal remedies available to him relative to the invalidity of Judge Rohl's Authorization Order. Upon exhaustion of such remedies, Petitioner indicated he wished to return to the Grand Jury to purge the contempt.

The Government moved to hold Petitioner in contempt. Judge Wexler so held Petitioner and ordered him confined.

The Judgment and Commitment for Contempt, dated August 16, 1989 (pp. 18a-19a), states that Petitioner was being held in Contempt for failure to obey the Oral Order *and* the Compulsion Order dated August 16, 1989. It must be noted, again, that Petitioner did not disobey the Compulsion Order since Petitioner at no time refused to testify by invoking his privilege against self-incrimination.

Rather, Petitioner clearly indicated in the Grand Jury and before the Court Below at the Commitment Hearing that he in no fashion invoked his Fifth Amendment privilege, that his refusal to respond to the questions of the Grand Jury was purely on the basis of the improper and invalid questions propounded by the Grand Jury based upon the fruits of impermissible electronic surveillance.

Petitioner requested, and the District Court acknowledged, that when Petitioner exhausted his legal remedies in connection with the instant issue, he be permitted to return to the Grand Jury to purge himself of the failure to answer.

The Second Circuit Court of Appeals affirmed the Order of the District Court holding the Petitioner in Civil Contempt (pp. 1a-12a).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

Under Title III, Does a Judge Have Authority to Order Electronic Surveillance to Gather Evidence of "Non-Designated" Offenses?

It is uncontested that under Title III legislation, a Federal Judge does not have the power or right, upon an Original Application, to authorize electronic surveillance to gather evidence of violations relating to Federal excise taxes. Section 2516.

A closer view of Title III, its intentions, and its application to the patently impermissible authorization herein, shall make the above more apparent.

A. The Congressional Intent to Limit Electronic Intercepts

Prior to enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 et.seq.), Congress conducted an extensive investigation and determined that criminals made extensive use of wire and oral communications, and that the electronic interception of such communications would be a valuable aid to law enforcement. *P.L. 90-351, Findings* Sec. 801(c), reprinted in 1968 U.S. Code Congress and Ad. News 253.

At the same time, however, Congress determined that in order to effectively protect the wire and oral communications of innumerable innocent, law-abiding private citizens, it was essential to clearly and specifically define the circumstances and conditions under which the interception of such communications and the use of the contents thereof could be authorized. *P.L. 90-351, Findings, supra,* Sec. 801(b) at 253.

At the time of passage of Title III, Senator McClellan, one of the drafters and leading proponents of Title III, stated the specific purpose of the legislation:

> * * * Nevertheless, more was involved in the fight (to secure the enactment of Title III) than an attempt to strengthen the hand of law enforcement. Each of us who worked so long and hard for Title III had as an equally important goal: the protection of the privacy of the law abiding citizen. (Congressional Record, Vol. 115, No. 136, pg.1)

This Court subsequently confirmed that protection of privacy was the overriding concern of Congress when it enacted Title III. *Gelbard v. United States,* 408 U.S. 41,49; 92 S.Ct. 2357,2361; 33 L.Ed.2d 179 (1972).

B. Title III Provisions

Title III as enacted, provided that electronic surveillance may not be used in any Federal Trial, proceeding, or Grand Jury unless strict conformity to the statute's provisions is maintained (Section 2515).

Indeed, strict compliance with the strictures of the statute is an integral part of Title III, *Gelbard v. United States, supra,* at 48-50.

Title III, Section 2516(1) authorizes the interception of communications only when Federal law enforcement officials "are investigating *certain specified crimes.*" *United States v. Millstone Enterprises, Inc.* 684 F.Supp. 867 (W.D. Pa. 1988); revsd on other grounds, 864 F.2d 21 (3rd Cir. 1988); 18 U.S.C. 2516(1) [emphasis added].

C. Electronic Surveillance is Not Permitted Solely for Federal Tax Offenses

As aforesaid, Judicial approval to authorize interception of wire and oral communications is obtainable only after compliance with Title III's strict procedures. 18 U.S.C. Sec. 2518. See *United States v. Giordano,* 416 U.S. 505, 513, 94 S. Ct. 1820, 40 L.Ed.2d 341 (1974); *Gelbard v. United States, supra,* at 46.

A Federal Judge has no right or power whatever to authorize, on an original Application, either electronic interceptions for crimes not enumerated under 18 U.S.C. 2516, or the subsequent use of evidence derived therefrom in *any* Federal Court or Grand Jury proceedings. 18 U.S.C. 2515, 2518(3)(a).

Thus, it is beyond peradventure of doubt that authorization to electronically intercept wire or oral communications in the investigation of Federal excise tax violations does not exist within Title III.

As aforesaid, the Second Circuit in its opinion herein, the Government in its Appellate Brief to the Second Circuit, and the District Judge in *Levine, supra,* which decision was relied upon by the District Court herein Below, clearly acknowledged that evasion of Federal excise taxes and other related Federal tax violations have been expressly precluded from the list of crimes for which use of electronic eavesdropping was authorized under Section 2516.

Thus, clearly, under no circumstances could an application to investigate Federal excise taxes be authorized by a Federal Judge in this case *ab initio,* that is, upon an original application.

A Fortiori, no state judge had the power to authorize, on an original application, electronic surveillance, to gather evidence on non-designated offenses for use in Federal proceedings.

II

Under Title III, Does a Judge Have Authority in an Amending/Expansion Order to Order Electronic Surveillance of "Non-Designated" Offenses?

It is apparent from the previous discussion that no Federal or state Judge, has the power to authorize, on an original application, electronic surveillance to investigate Federal excise tax offenses.

The Second Circuit herein, however, engrafted 'an apparent exception' to the plain language designated offense restrictions of Title III Section 2516, holding that on a Secondary application for amendment of an original Authorization, under Section 2517, a Court may permit electronic surveillance of *any* communications, to gather evidence of any crimes, even those which are not Title III "designated offenses," including the investigation of Federal excise taxes. This holding, if permitted to stand, effectively nullifies the statutory safeguards Congress specifically crafted into Title III and substantially imperils the right of privacy guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution.

While Title III does permit law enforcement officials to make an application to amend an order authorizing electronic surveillance, to add designated crimes that had not been included in the original authorization (Section 2517(5)), this provision clearly was not intended to open the flood-protection gates of Title III, permitting authorization for a deluge of crimes not designated in Section 2516.

Section 2517 specifically proscribed the inclusion of non-designated offenses in an Amendment/Expansion Order when it indicated:

> When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications *relating to offenses other than those specified in the order of authorization* or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsection (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the *contents were otherwise intercepted in accordance with the provisions of this chapter.* Such application shall be made as soon as practicable. Title III, 18 U.S.C. 2517 (Emphasis added) (p. 26a)

The plain language of Section 2517 requires a Federal Judge, before permitting the expansion of an already existing Authorization, to determine that any intercept be approved and undertaken "in accordance with the provisions of (Title III)".

There is no basis whatever for that portion of the Second Circuit holding which indicated, inter alia:

> * * * We believe, however, that Congress intended that Amended orders under Section 2517(5) could encompass Federal crimes not listed in Section 2516." (p. 8a)

The Second Circuit cited the Legislative History of Title III to engraft "an apparent exemption from the requirement that the offense be among those designated in the Section 2516 list." (p. 8a)

The Second Circuit did not - yea, could not - cite any language - plain or otherwise - of Title III to support its enactment of "an apparent exemption" to the designated offense list. This omission strongly underscores the lack of apparency of any claimed exemption.

Indeed, the plain language of the text of Title III is controlling and superior to any Legislative History. It is academic that where historical evidence suggests a meaning contrary to the apparent import of the statutory language, the plain meaning of the statute, not the history, is paramount. *Ford Motor Credit Co. v. Cenance,* 452 U.S. 155; *United States v. Hescorp,* 801 F.2d 70.

The Second Circuit, searching for a foothold to justify its decision herein, suggested further, inter alia:

> (Title III) states that amended orders are permitted only upon 'a showing that the original order was lawfully obtained, that it was sought in good faith and not as a subterfuge search and that the communication was in fact incidentally intercepted during the course of the lawfully executed order'* * * . (p. 9a)

By these articulated standards, the intercept herein clearly fails yet again to be valid.

The communications herein were clearly not incidentally intercepted subsequent to the original Authorization Order. Indeed, the original application specifically recited that the anticipated communications for which an order was sought would necessarily, *eo instante,* include evidence of Federal excise

tax violations as well as evidence of State and local excise tax violations (pp. 39a; 42a).

Thus, in the instant case, the Federal excise tax violations were clearly anticipated to be surveilled at the very outset of the application and were *not* subsequent, unanticipated, or inadvertent.

The original Application, indeed, described with equal detail and asserted probable cause the anticipated evidence of Federal excise tax violation as well as the State and local excise tax violations.

The original Application stopped short only in requesting authorization to surveil for such Federal offenses as well as the State and local offenses. The reason for such non-request for authorizations is patent. The Task Force *could not* have asked for such authorization in the original Application lest it be denied out of hand for direct and blatant violation of the enabling statute.

Thus, the Task Force - which included substantial Federal participation - withheld its request for authorization to surveil for the Federal crimes until the second application, even though it was specifically and originally "avowed" that such conversations would be intercepted.

Could such failure have been oversight? Or was the Task Force's reluctance recognition that such original application would be denied?

Under such circumstances, does the mere passage of time and recognition of initial infirmity trigger the "apparent exemption" spoken of by the Second Circuit, permitting authorization on a second bite at the apple?

Surely, such is less than open- and even-handed tactics, and speaks of sharp evasion of specific Congressional intent.

Permitting the Government to use this method to sidestep Title III to obtain authorization of interceptions relating to crimes that could not be the subject of a warrant *ab initio* abrogates Title III in toto.

In effect, the Second Circuit's reasoning sanctions a general search and violates innocent citizens' rights to privacy that Congress so carefully tried to protect by its enactment of Title III. In interpreting a provision of law "our lodestar must be the statute's fundamental purpose." *United States v. Holroyd,* 732 F.2d 112 (2nd Cir. 1984), quoting *Silver v. Molasco Corp.,* 602 F.2d 1083, 1087 (2d Cir. 1979) revs'd on other grounds, 447 U.S. 807, 100 S.Ct. 2486, 65 L.Ed 2d 532 (1980).

It should be noted, the Petitioner herein is not a defendant. He is a private citizen who refused to "divulge" in violation of Title III, and has been confined therefor since August 1989.

Extended to its illogical conclusion, the Second Circuit's "apparent exemption" totally nullifies Title III and permits authorization of any electronic surveillance for any crime, conditioned only that application is stutter-timed.

Neither in policy nor in logic should the specific provisions of Title III be deemed nugatory merely by the purposeful exclusion of a request in the original Application, only to be included - without genuine "incidental" interception - thereafter as "an apparent exemption." Such holding by the Second Circuit has not created a sound policy but rather an unsound paradox, a pretext which is a precedent for yet other incursions.

Clearly, such was not the intention of Congress in enacting Title III. Indeed, such all-embracive amendatory expansion is specifically proscribed by Section 2517.

To ignore or gloss over the restrictions of Title III, "or to view them as mere technicalities to be read in such a fashion

as to render them nugatory, then is to place in peril our cherished personal liberties." *United States v. Marion,* 535 F.2d 679, 706 (2nd Cir. 1976).

If it was Congress's intent to allow electronic surveillance for *any* crime or offense, so long as the Application for crimes not included in an original Application was subsequently made, Congress would not have taken such great care in specifically listing the crimes for which a valid surveillance warrant could issue. Nor would Congress have indicated that subsequent applications had to comply with the other requirements of Title III.

To hold otherwise would make a farce of the whole premise upon which Title III was enacted - to safeguard the right to privacy of innocent citizens from electronic surveillance, as mandated by the Fourth Amendment.

III

Under Title III, Can a State Court Judge Authorize in an Original or in an Amending/Expansion Order, Electronic Surveillance of "Non-Designated" Offenses for Use in Federal Proceedings?

A. State Judges May Not Tred Where Federal Judges Cannot Go

As aforesaid, and as recognized by the Second Circuit and acknowledged by the Government herein, a Federal Judge could not have signed a surveillance order authorizing the interception of electronic surveillance to investigate a Federal excise tax matter in an original order.

Moreover, a Federal Judge could not, upon an Application for an enlargement of the original warrant, totally disregard the provisions of Title III, and authorize interception for crimes not permitted by Section 2517.

Rather, a Federal Judge would necessarily be required to ensure that the Amendment and subsequent interceptions were otherwise intercepted in accordance with Title III.

As a Federal Judge, in an original Order or in an Amending/Expansion Order, cannot expand the list of Federal crimes for which electronic surveillance may be had, a state judge has no greater authority or power to expand the list of Federal crimes for which electronic surveillance may be utilized by Federal Grand Juries or amplify the competence of evidence which may be used in Federal Courts or before Federal Grand Jury proceedings.

The New York State Courts have acknowledged such limitation, indicating that a state judge may not amend a warrant to include offenses which could *never* have appeared there originally. *People v. Schipani,* 56 A.D.2d 126, 130 (2nd Dept. 1977). Such a proposition is utterly unacceptable both in the State Court and in the Federal Court, and should not be permitted in the instant case.

B. Separate State and Federal Applications Were Required Herein

In a situation analogous to the instant case, *U.S. v. Marion,* 535 F.2d 697, held, inter alia:

> . . . where federal and state officers pursue an investigation jointly . . . from its inception, we forsee little difficulty for the appropriate federal officer to obtain a separate order authorizing the interception of communications relating to the Federal offenses believed involved.

In a footnote in *Marion,* that Court further said:

> While to some such a pas de deux, i.e., of requiring separate state and federal orders, may

appear cumbersome or duplicative, *it is the necessary result of a statutory scheme which restricts federal and state wiretaps, in the first instance, to enumerated federal and state offenses repectively.* See, e.g., 18 U.S.C. Sec. 2516; N.Y. Crim. Proc. Law Sec. 700.10, 700.05(8). Inasmuch as *the interception of communications relating to different federal offenses would not under those circumstances be incidental,* it would be neither unduly onerous nor inappropriate under Title III to secure separate prior judicial authorizations. Certainly it would not destroy flexibility in joint investigations, nor deter their utilization in proper cases. 535 F.2d at 707 n.20. (emphasis added)

IV

Was the Surveillance Documentation Herein Facially Valid?

A. Facially, the Authorizing Order is Defective

Petitioner moved initially herein to Quash the Subpoena on the ground that the Authorizing Documentation was facially defective.

Petitioner was entitled, as a matter of law, to have the District Court pass upon such facial validity, and if, as Petitioner contended, the Authorization Documentation was defective, Petitioner was entitled, also as a matter of law, to bring his Grand Jury appearance to a halt on the basis of such illegality.

The District Court's order, dated August 4, 1989, denying Petitioner's motion to Quash a Subpoena, holding that Petitioner had no right to a Suppression hearing to test the validity of the underlying surveillance, was inapposite.

No hearing is, or was, necessary to determine the facial invalidity of the Eavesdropping Documentation herein as a matter of law.

Indeed, all the Circuit Courts throughout the country which have addressed similar situations, including the Second Circuit, have uniformly permitted Grand Jury witnesses to challenge questions based on illegal eavesdropping, at least to the extent of an in camera review of the Eavesdropping Documentation to determine its facial validity. *U.S. v. Petito,* 671 F.2d 68 (2nd Cir. 1982); *U.S. v. Pacella,* 622 F.2d 640 (2nd Cir. 1980); *In Re Grand Jury Proceeding, Grand Jury No. 87-4,* 856 F.2d 685 (4th Cir. 1988); *In Re Grand Jury Proceedings, (McElhinney),* 677 F.2d 738 (9th Cir. 1982); *In Re Grand Jury Proceedings, (Worobyzt),* 522 F.2d 196 (5th Cir. 1975); *In the Matter of Special February 1977 Grand Jury (Pavone),* 570 F.2d 674 (7th Cir. 1977); *In Re Lochiatto,* 497 F.2d 803 (1st Cir. 1974); *Melickan v. U.S.,* 547 F.2d 416 (8th Cir. 1977); *In Matter of Persico,* 491 F.2d 1156 (2d Cir. 1974).

The Second Circuit unquestionably previously recognized that a witness is entitled to an in camera inspection by the District Court to determine if the underlying order complies with the applicable statute (Title III) in *U.S. v. Pacella, supra.*

Indeed, in *U.S. v. Petito, supra,* at 74, the Second Circuit, citing *Persico,* indicated, inter alia:

> * * * On appeal we noted that the determination of facial validity at an in camera examination was sufficient to require an individual to answer Grand Jury questions.

See also *U.S. v. Morales,* 566 F.2d at 402, 406 (2d Cir. 1977).

The First Circuit in *In Re Lochiatto, supra,* at 806, noted that *Persico* held that a Defendant, although not entitled to a *hearing* on the legality of the electronic surveillance, was "entitled to an in camera inspection of the Court Order to determine facial validity."

The District Court's reliance upon the Government's affirmative statement that the wire tap conformed to statutory requirements, and upon the opinion in *U.S. v. Levine, supra,* did not satisfy Constitutional standards. An *in camera* inspection of the Authorization Orders to determine their validity was required.

The Second Circuit indicated that the District Court had fully considered the Petitioner's objections on two occasions, August 4, 1989 and August 12, 1989, and that an additional in camera review was not necessary.

The District Court's Memorandum and Order dated August 4, 1989 (Wexler, J.), however, did not address the Petitioner's claims as to the validity of the authorizing eavesdropping orders. Judge Wexler merely ruled that Petitioner was not entitled to a plenary hearing. The District Court, in dictum, noted that if Petitioner did have standing to challenge

the wiretap, the Court would have denied his motion for the reasons discussed in Judge Nickerson's opinion in *United States v. Levine,* 690 F.Supp. 1165 (E.D.N.Y.).

The District Court did not further consider Petitioner's objections to the authorization orders on August 12, 1989. On that date, the Court telephonically denied Petitioner's Application for Reargument before ever receiving a written application.

The District Court's reliance upon the decision in *Levine, supra,* was misplaced.

First, of course, as acknowledged by the Government, the *Levine* decision did not bind the District Court or the Second Circuit Court of Appeals, and certainly does not bind this Court.

> * * * district judges must not treat decisions by other district judges, in this and *a fortiori* in other circuits, as controlling, unless of course the doctrine of res judicata or of collateral estoppel applies . . . the responsibility for maintaining the law's uniformity is a responsibility of appellate rather than trial judges . . .

Colby v. J.C. Penny Co. Inc., 811 F.2d 1119, 1124 (7th Cir. 1987).

It should be pointed out that *Levine* was a defendant in both a state investigation and a Federal investigation. Thus, the electronic surveillance could have, in any event, been used against *Levine,* at least in New York State.

Petitioner, on the other hand, is a witness and is only subjected to Federal Grand Jury inquiry. There were no supervening state authorities which legitimatized a subpoena to Petitioner in a Federal proceeding based upon a facially defective Authorization order.

Thus, obviously, the matter is not *res adjudicata,* as *Levine* did not involve the same issues or parties.

B. The Decision of the Court of Appeals is Contradicted by the Plain Language of Title III

The Second Circuit's holding is not consonant with Section 2517 which requires strict compliance "with the other provisions (of Title III)" on an Application to Amend.

Neither Federal nor New York State statutes can be construed to authorize law enforcement officials to create a procedure that legitimizes the use of interceptions of communications which specifically have been proscribed for use in Federal Courts merely by delaying the application to a later time - particularly where interception of conversations relating to the said crimes were "avowed" to be anticipated.

It is incomprehensible to imagine that Congress would painstakingly decide which Federal crimes could be the subject of valid electronic surveillance, have so carefully safeguarded the privacy of wire communications, and then blindly allow an amendment to an Authorizing Order to retroactively include offenses which could never have been approved had they been written in the Original Application.

The Second Circuit has relied on a single sentence in the legislative history of Title III that offenses under 2517(5) need not be designated offenses.

The Second Circuit's reliance on this sentence has effectively given the Government a blank check that will permit the incorporation of every crime, whether designated by 2516, into an Amendment/Expansion Authorization.

Such amendment would operate to expand the law and the scope of an investigation beyond bounds minutely and carefully formulated. *People v. Schipani, supra,* 56 A.D.2d at 130.

CONCLUSION

In this era of burgeoning criminal investigations by electronic surveillance, this Court's guidance is needed to inform the Government's Police and Prosecutorial Branches of their obligation to comply with applicable statutory standards and to act in compliance with applicable Fourth Amendment standards in investigations conducted jointly with agents and prosecutors of the various States.

Precisely because the need for action and use of electronic surveillance to combat organized criminal activity is necessary, the need for vigilance against unconstitutional excess is great. As was said in the dissent of *Skinner v. Railway Labor Executives,* ___ U.S. ___, 109 S.Ct. 1402, 1422, 489 U.S. ___, ___ L.Ed.2d ___ (1989). "History teaches that grave threats to liberty often come in times of exigency, when Constitutional Rights seem too extravagant to endure."

For the foregoing reasons, the Petitioner respectfully requests that the Petition for Certiorari be granted.

Dated: New York, NY
January 10, 1990

Respectfully submitted,

JOHN NICHOLAS IANNUZZI
Attorney for Petitioner
John Doe

John Nicholas Iannuzzi
Joan A. Alpert
On the Petition

APPENDICES

Appendix A
Opinion of the Second Circuit Court of Appeals
(November 8, 1989)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 417—August Term, 1989

Argued: September 13, 1989
Decided: September 18, 1989
Opinion Filed: November 8, 1989

Docket No. 89-6171

IN RE: GRAND JURY SUBPOENA SERVED ON JOHN DOE

JOHN DOE, A GRAND JURY WITNESS,

Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

Before:

LUMBARD, CARDAMONE, and FRIEDMAN,*
Circuit Judges.

* Daniel M. Friedman, United States Court of Appeals for the Federal Circuit, sitting by designation.

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(November 8, 1989)

John Doe appeals from an order of the United States District Court for the Eastern District, Wexler, *J.*, denying his motion to quash a subpoena compelling him to testify before the grand jury. After refusing to testify, appellant was held in civil contempt and incarcerated. He seeks a reversal of the contempt finding and a quashing of the subpoena.

Affirmed.

JOHN NICHOLAS IANNUZZI, New York, N.Y. (Iannuzzi and Iannuzzi, New York, N.Y., Joan A. Alpert, of counsel), *for Appellant.*

JAMES H. RODIO, Attorney, Tax Division, Department of Justice, Washington, D.C. (Shirley D. Peterson, Assistant Attorney General, Robert E. Lindsay, Alan Hechtkopf, Kimberly M. Zimmer, Attorneys, Department of Justice, Washington, D.C.; Andrew J. Maloney, United States Attorney for the Eastern District of New York, Brooklyn, New York, of counsel), *for Appellee.*

LUMBARD, *Circuit Judge*:

John Doe appeals from an order of the United States District Court for the Eastern District of New York, Wexler, *J.*, denying his motion to quash a subpoena compel-

ling him to testify before the grand jury. After refusing to testify, appellant was held in civil contempt and ordered incarcerated until he appeared to testify. He remains under house arrest, and seeks a reversal of the contempt finding and a quashing of the subpoena.

Having heard argument on September 13, 1989, we acted in compliance with the requirements of 28 U.S.C. § 1826(b) and on September 18 filed an order affirming the District Court. This opinion follows.

I.

On August 2, 1985, Suffolk County Judge Kenneth K. Rohl, acting at the request of the New York State Attorney General, and on the supporting affidavit of an investigator with the New York State Department of Taxation and Finance, issued an order authorizing state and federal law enforcement officials to conduct electronic surveillance of the offices of Sheldon Levine at 445 Broadhollow Road in Melville, New York. Levine and others, known and unknown, were suspected of committing grand larceny, falsification of business records, and conspiracy to commit these crimes in violation of New York Penal Law.

The investigation preceding the request for surveillance was conducted by the Long Island Gas and Oil Industry Task Force ("Task Force"), comprised of representatives from local, state, and federal law enforcement agencies, including the New York State Attorney General, local police departments and district attorneys, the Federal Bureau of Investigation, and the Internal Revenue Service. Created in 1982, the Task Force was charged with investigating the influence of organized crime on the distribution of fuel oil and gasoline on Long Island.

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Judge Rohl's authorization, granted under New York's eavesdropping statute, N.Y. Crim. Proc. Law Art. 700 (McKinney 1984 and 1989 Supp.), allowed both the federal and state law enforcement officers on the Task Force to conduct the surveillance, but use of the intercepted communications was expressly limited to evidence of the three state crimes.

In November 1985, the New York Attorney General and the Assistant Attorney-in-Charge of the Organized Crime Strike Force for the Eastern District of New York, both of whom were members of the Long Island Task Force, submitted affidavits to Judge Rohl stating that the surveillance conducted thus far had revealed evidence of federal crimes, including federal tax offenses, and requesting that the August 2 order be amended to permit the use of that evidence before a federal grand jury then investigating, among other crimes, violations of federal tax laws. On November 8, acting pursuant to a section of the federal eavesdropping statute, 18 U.S.C. § 2517(5), Judge Rohl granted their request and amended the August 2 order to allow all intercepted oral communications relating to federal crimes to be used in any federal grand jury proceeding or in any court of the United States. The federal crimes specifically listed in the amended order were 18 U.S.C. §§ 1962 and 1963 (relating to racketeer influenced and corrupt organizations); 18 U.S.C. §§ 1503, 1510 and 1512 (relating to obstruction of the due administration of justice, a criminal investigation and tampering with a witness); 18 U.S.C. § 1341 (relating to mail fraud); 18 U.S.C. § 1343 (relating to wire fraud); 18 U.S.C. §§ 2314 and 2315 (relating to interstate transportation, receipt and sale of stolen property); 18 U.S.C. §§ 1621, 1622 and 1623 (relating to perjury); 18 U.S.C. § 371 (relating to conspiracy); 26 U.S.C. §§ 7201, 7202, 7203 and 7206(1) and (2)

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(relating to violations of the tax laws); and Title 31 of the United States Code (relating to violations under the Currency and Foreign Transactions Reporting Act).

After the communications intercepted by the surveillance revealed appellant's name, a subpoena was issued on July 25, 1988 under the authority of the United States District Court for the Eastern District of New York directing him to appear and testify on September 14, 1988 before the federal grand jury. The appellant having failed to appear on the scheduled date, Judge Wexler in November 1988 ordered him to testify or show cause why he should not be compelled to do so.[1] At several hearings in June and July 1989 before Judge Wexler, appellant claimed that his suffering from a number of cardiovascular and respiratory ailments precluded him from testifying. On July 20, 1989, Judge Wexler found that the appellant was physically able and directed him to testify.

Meanwhile, on May 16, 1989, appellant moved to quash the subpoena, arguing, *inter alia*, that Judge Rohl's amended surveillance order impermissibly encompassed federal tax offenses not listed in 18 U.S.C. § 2516, the statute that specifies federal crimes for which surveillance is authorized. On August 4, Judge Wexler denied the motion to quash and twelve days later he denied reconsideration.

On August 16, appellant appeared before the grand jury and refused to testify, claiming a fourth amendment privilege based on the illegality of the surveillance order. After a hearing that same day, Judge Wexler determined that

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1 The record is silent on the reason for the nearly three-year delay between Judge Rohl's November 1985 amendment of the surveillance order and the September 1988 subpoena of appellant. It is similarly bereft of an explanation for the delay between the September 1988 subpoena and the November 1988 show cause order.

appellant understood the ramifications of his refusal to testify, cited him for civil contempt, and ordered him incarcerated.

II.

Appellant objects to Judge Wexler's order on three grounds: first, that he was entitled to an *in camera* review of the validity of the surveillance order before he could be held in contempt; second, that the authorization is facially invalid under 18 U.S.C. § 2517; and third, that Judge Rohl lacked authority to permit surveillance relating to federal crimes. We reject all three contentions.

A. In Camera *Review*

Appellant argues that grand jury witnesses are entitled, as a matter of law, to at least an *in camera* review of the validity of an eavesdropping order before they may be compelled to testify. We believe that Judge Wexler fully considered appellant's objections on August 4 and 12 and that an additional *in camera* review was not necessary. Judge Wexler was provided with the text of Judge Rohl's authorizations and the supporting affidavits, and he accorded appellant the opportunity to file papers in support of his motion to quash. Moreover, Judge Wexler considered Judge Nickerson's opinion in *United States v. Levine*, 690 F. Supp. 1165 (E.D.N.Y. 1988), which had upheld the validity of the amended surveillance order, as it pertained to Levine. under 18 U.S.C. § 2517(5). Acknowledging that he was not bound by *Levine*, Judge Wexler noted that Judge Nickerson's reasoning was "both compelling and correct." Judge Wexler added: "Thus, even if [appellant] had standing to challenge the wiretap, this Court would deny his motion for the reasons discussed in

Judge Nickerson's opinion." There was no need for an *in camera* review.

B. *Federal Crimes as "Other" Offenses Under 18 U.S.C. § 2517(5)*

Appellant next argues that Judge Rohl's amendment of the initial order to allow surveillance for evidence of federal tax offenses was invalid under 18 U.S.C. § 2517(5). That section states:

> When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom

may be disclosed under oath at official proceedings if "authorized or approved by a judge of competent jurisdiction."

Appellant contends that the phrase "in the manner authorized herein" requires that amended orders address only such offenses as are specified in Section 2516. That section contains an extensive list of offenses for which surveillance is authorized but, as appellant notes, it does not specify federal tax offenses—the offenses on which he was to be questioned by the grand jury.[2]

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2 Although both appellant and the Government agree that appellant was to be questioned regarding federal tax offenses, that fact is unclear from the record. The subpoena compelling appellant to appear and testify does not state the scope of the grand jury's investigation. However, the subpoena does provide the name of the Government's counsel and identifies him as an attorney with the Tax Division of the Criminal Section of the Department of Justice.

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(November 8, 1989)

This issue—whether an amended order can authorize use of communications revealing evidence of crimes that could not have been investigated under an original order—is one of first impression in this Circuit. We hold that "other" offenses under Section 2517(5) may include offenses, federal as well as state, not listed in Section 2516 so long as there is no indication of bad faith or subterfuge by the federal officials seeking the amended surveillance order. The Government here concedes that the federal tax offenses at issue could not properly be investigated in the first instance by a Section 2516 order. We believe, however, that Congress intended that amended orders under Section 2517(5) could encompass federal crimes not listed in Section 2516. The Senate Report accompanying Section 2517(5) states that "other" offenses under that section "need not be designated 'offenses,' " an apparent exemption from the requirement that the offense be among those designated in the Section 2516 list. S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2189 (hereinafter "Legislative History"). Our holding in *United States v. Tortorello*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973), lends further support to this construction of the statute. Although we did not address this issue directly, we upheld an amended order under Section 2517(5) even though the offenses regarding which evidence was to be used—federal securities law violations—are not included in Section 2516. *See id.* at 781-83.

Appellant responds that allowing amended orders to permit use of evidence relating to offenses that may not be the subject of original orders would subvert the detailed scheme of Section 2516 and threaten the privacy interests the statute aims to protect. The Senate Report reveals, however, that Congress accommodated these concerns in

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the statute. It states that amended orders are permitted only upon "a showing that the original order was lawfully obtained, that it was sought in good faith and not as [a] subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order." Legislative History at 2189.[3]

Each of these requirements is met here. Appellant does not contend in his brief, nor did he contend at oral argument, that the federal officials on the Task Force instigated the state's request for the first order largely to secure evidence of violations of federal tax crimes or that there was otherwise bad faith or deception on their part. The record demonstrates that the communications naming appellant were "in fact incidentally intercepted" under the authority of the first surveillance order. While Judge Rohl noted in the order that the targeted conversations would relate to, among other things, "theft of federal, state and local taxes," the supporting affidavit came from a state official, an investigator in the New York State Department of Taxation and Finance, and the order authorized the use of the intercepted communications only in prosecutions for state crimes. Through the Task Force, local, state, and federal officials were engaged in a cooperative effort to combat organized crime on Long Island. While it was of course possible that the surveillance relating to state crimes would reveal evidence of federal crimes—motor fuel is subject to both federal and state taxation—there is no indication, nor even any assertion by appellant, that the disclosures regarding federal crimes were anything other than an incidental by-product of the first surveillance. Based on that surveillance, a Suffolk County grand jury indicted Levine, the initial target of the investigation,

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3 The Senate Report is sufficient as the full legislative history because Congress adopted the Senate bill. *See* Legislative History at 2112.

charging him with numerous violations of New York penal law. *See Levine*, 690 F. Supp. at 1171. Moreover, the state's interest in pursuing schemes such as Levine's is apparent: The affidavit supporting the first authorization stated, for example, that New York was losing at least $90 million per year in state tax revenue from such schemes.

In short, there is no showing that the federal authorities, by connivance with the state authorities, used the initial order as a pretext for uncovering evidence of crimes unauthorized by Section 2516. *See Levine*, 690 F. Supp. at 1169-71; *accord United States v. McKinnon*, 721 F.2d 19, 22-23 (1st Cir. 1983) ("Evidence of crimes other than those authorized in a wiretap warrant are intercepted 'incidentally' when they are the by-product of a bona fide investigation of crimes specified in a valid warrant."); *United States v. Pacheco*, 489 F.2d 554, 564 (5th Cir. 1974), *cert. denied*, 421 U.S. 909 (1975).

Acceptance of the appellant's position would jeopardize the essential state-federal cooperation envisioned by the federal wiretapping statute and embodied in this case by the Task Force. We noted in *United States v. Marion*, 535 F.2d 697, 707 (2d Cir. 1976), for example, that Congress, in enacting the surveillance statute, "specifically envisioned cooperation among law enforcement authorities of different jurisdictions where appropriate to enhance the effectiveness of electronic surveillance operations." The New York statute envisions similar cooperation by allowing surveillance to be conducted by both state and federal law enforcement officials. *See United States v. Manfredi*, 488 F.2d 588, 598 (2d Cir. 1973), *cert. denied sub nom. LaCosa v. United States*, 417 U.S. 936 (1974).

We noted in *dicta* in *Marion* that where state and federal officials jointly pursue an investigation and the surveil-

lance reveals communications relating to federal offenses not listed in the initial authorization, such interceptions "would not . . . be incidental." *Id.* at 707 n.20. We now hold that the interceptions naming the appellant in the instant case were revealed incidentally and without subterfuge, as the statute requires, even though they were the product of federal-state law enforcement cooperation.

C. *Judge Rohl's Authority to Permit Surveillance Relating to Federal Crimes*

Appellant relies on our opinion in *Marion* to support his argument that the federal law enforcement officials improperly applied to a state judge for authorization to conduct surveillance for federal crimes. His reliance is misplaced. Like the instant case, *Marion* involved a surveillance order issued by a state judge to discover evidence of state crimes, which order was amended by the same judge to encompass evidence of additional, federal offenses. We found that the affidavit of the Assistant District Attorney requesting the judge's amendment "clearly provided the state judge . . . with notification that possible federal offenses might be implicated" and thus satisfied Section 2517(5). *Id.* at 703. In contrast, because the federal grand jury in *Marion* also questioned the defendant based on information obtained from a different, *unamended* surveillance order, we found that the Government had "failed to obtain the subsequent judicial approval" required by Section 2517(5), and reversed the convictions for those offenses. *Id.* at 704. We expressly stated, however, that the statute does not "restrict . . . the grant of subsequent judicial approval . . . solely to federal judges." *Id.* at 708.

Moreover, Judge Rohl is a "judge of competent jurisdiction," expressly authorized under Section 2517(5) to amend surveillance orders. Section 2510 of the statute defines a "[j]udge of competent jurisdiction" as either (a) a judge of a United States district court or court of appeals *or* (b) "a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications." 18 U.S.C. § 2510(9). Appellant has not challenged Judge Rohl's authority under New York law.

Judge Rohl's amendment of the order in this case constitutes adequate judicial approval even though it encompassed federal criminal offenses that could not have been the legitimate subject of surveillance in the first instance. It would make little sense, and would serve no public policy, to deny federal law enforcement agencies the use of evidence that has been serendipitously discovered in the course of surveillance conducted according to law.

III.

In sum, we reject appellant's objections to the subpoena to testify before the grand jury. Judge Wexler's order holding appellant in civil contempt and his incarceration of appellant, during the term of the grand jury, until he complies with the terms of the subpoena are affirmed.

Appendix B
Order of the Second Circuit Court of Appeals
(September 18, 1989)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of September, one thousand nine hundred and eighty-nine.

Present:

HONORABLE J. EDWARD LUMBARD
HONORABLE RICHARD J. CARDAMONE
HONORABLE DANIEL M. FRIEDMAN*
Circuit Judges.

Filed September 18, 1989
Docket No. 89-6171

IN RE: GRAND JURY SUBPOENA
SERVED ON JOHN DOE,

JOHN DOE, A GRAND JURY WITNESS,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

This is an appeal from an order of the United States District Court for the Eastern District of New York (Wexler, J.), holding appellant, John Doe, in civil contempt and

Appendix B
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(September 18, 1989)

incarcerating him for his refusal to testify before a special grand jury in violation of court orders.

A notice of appeal was filed by appellant on August 16, 1989. We heard oral argument in this matter on September 13, 1989 since such an appeal must be heard and decided within 30 days from the filing of the notice of appeal, pursuant to 28 U.S.C. Section 1826(b) (1982).

The district court's order holding appellant in civil contempt is affirmed. An opinion will be filed at a later date.

The question raised at oral argument as to whether appellant may remain at liberty in light of his medical condition is referred to the district court.

/s/_____
J. Edward Lumbard, U.S.C.J.

/s/_____
Richard J. Cardamone, U.S.C.J.

/s/_____
Daniel M. Friedman, U.S.C.J.

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* Honorable Daniel M. Friedman, U.S. Circuit Judge, Federal Circuit, sitting by designation.

Appendix C
Memorandum and Order of the District Court
(Wexler, J.) (August 4, 1989)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: GRAND JURY SUBPOENA SERVED ON JOSEPH PATA

CV 89-1697

APPEARANCES:

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JAMES K. RODIO, ESQ.
U.S. Department of Justice
Tax Division
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10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

WEXLER, District Judge

The present action arises out of an electronic surveillance of the offices of Sheldon Levine ("Levine Wire"). During the course of the surveillance, the government intercepted conversations of Joseph Pata. On February 5, 1989, the Government subpoenaed Pata to testify before a Special Grand Jury. Pata files a motion to quash the subpoena based upon an alleged illegal electronic surveillance.

Appendix C
Memorandum and Order of the District Court
(Wexler, J.) (August 4, 1989)

Facts

On August 2, 1985 Suffolk County Judge Kenneth L. Rohl issued an eavesdropping order. This order authorized state and federal officials to wiretap the offices of Sheldon Levine. In support of the wiretap application, federal and state law enforcement authorities submitted affidavits asserting that for approximately five years certain gasoline distributors along with various members of Mafia families engaged in a scheme to evade paying excise taxes. The affidavits contended that the Levine Wire would reveal evidence of both state and federal crimes. During the wiretap, conversations of Mr. Pata were intercepted. Alleging an illegal wiretap, Pata moves to quash his grand jury subpoena.

Discussion

The Second Circuit has held that a grand jury *witness* has no right to a suppression hearing *even* if he is being tried for civil contempt for refusing to answer questions after a court compulsion order. Thus, in *In re Persico,* 491 F.2d 1156, 1162 (2d Cir. 1974) the Court of Appeals for the Second Circuit concluded:

> We hold that in contempt proceedings initiated when a witness who has been granted "derivative use" immunity refuses to answer questions propounded by a grand jury because he claims he is entitled to a hearing to ascertain whether the questions posed are the product of unlawful electronic surveillance the witness is not entitled to a plenary suppression hearing to test the legality of that surveillance. We hold that the refusal would be permissible only if there is an absence of a necessary court order or if there is a concession from

> the government that the surveillance was not in conformity with statutory requirements or if there is a *prior* judicial adjudication that the surveillance was unlawful.

Concerning the Levine Wire, Judge Rohl issued the required court order. Moreover, in its brief opposing Pata's motion to quash, the government affirmatively states that the wiretap conformed to statutory requirements.

Finally, the Court wishes to note that the legality of the Levine Wire has been adjudicated. Based on its investigation, the Government indicted Sheldon Levine. Before Judge Nickerson of the Eastern District of New York, Levine challenged the legality of the wiretap. In an extensive opinion Judge Nickerson upheld the validity of the wiretap in all respects. *United States v. Levine,* 690 F.Supp. 1165 (E.D.N.Y. 1988). Although Judge Nickerson's opinion does not bind a fellow district court judge, this Court finds Judge Nickerson's reasoning both compelling and correct. Thus, even if Pata had standing to challenge the wiretap, this Court would deny his motion for the reasons discussed in Judge Nickerson's opinion.

SO ORDERED.

/s/_____
LEONARD D. WEXLER
UNITED STATES DISTRICT JUDGE

Dated: Hauppauge, New York
August 4, 1989

Appendix D
Judgment and Commitment for Contempt
(Wexler, J.) (August 16, 1989)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: GRAND JURY SUBPOENA
SERVED ON JOSEPH PATA

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89 CV 1697 (LDW)

On motion of the United States Attorney for the Eastern District of New York, for an Order by the Court to enforce its Order of August 16, 1989, heretofore entered in the above-entitled matter, the witness, Joseph Pata, appearing before the Court in person and with counsel, and said witness having admitted that he had refused and would continue to refuse to answer the questions directed to him before the Grand Jury, the Court having heard argument of counsel:

IT IS ADJUDGED that Joseph Pata is in direct and continuing contempt of this Court for his failure to obey the oral order and the Order of this Court, dated August 16, 1989, heretofore entered herein.

IT IS, THEREFORE, ORDERED that Joseph Pata be and hereby is committed to the custody of the United States Marshall for the Eastern District of New York until such time as he shall obey said Order and that he shall be allowed to bring his medicine to the location where he is placed in custody.

Appendix D
Judgment and Commitment for Contempt
(Wexler, J.) (August 16, 1989)

SO ORDERED.

Dated: Hauppauge, New York
August 16, 1989

/s/_____
LEONARD D. WEXLER
United States District Judge

Appendix E
Statutory Provisions Involved

18 U.S.C. Section 2515.
Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. Section 2516.
Authorization for interception of wire, oral, or electronic communications

(1) The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of-

> (a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), section 2284 of title 42 of the United States Code (relating to sabotage of nuclear facilities or fuel),

or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), chapter 102 (relating to riots), chapter 65 (relating to malicious mischief), chapter 111 (relating to destruction of vessels), or chapter 81 (relating to piracy);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 751 (relating to escape), sections 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential and Presidential staff assassination, kidnaping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1958 (relating to use of interstate commerce facilities in the commission of murder for hire), section 1959 (relating to violent crimes in aid of racketeering activity), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 1956 (laundering of monetary instruments), section 1957 (relating to engaging in monetary trans-

actions in property derived from specified unlawful activity), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), section 1343 (fraud by wire, radio, or television), sections 2251 and 2252 (sexual exploitation of children), sections 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), section 1203 (relating to hostage taking), section 1029 (relating to fraud and related activity in connection with access devices), section 3146 (relating to penalty for failure to appear), section 3521(b)(3) (relating to witness relocation and assistance), section 32 (relating to destruction of aircraft or aircraft facilities), section 1963 (violations with respect to racketeer influenced and corrupt organizations), section 115 (relating to threatening or retaliating against a Federal official), the section in chapter 65 relating to destruction of an energy facility, and section 1341 (relating to mail fraud), section 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, and assault), section 831 (relating to prohibited transactions involving nuclear materials), section 33 (relating to destruction of motor vehicles or motor vehicle facilities), or section 1992 (relating to wrecking trains);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

Appendix E
Statutory Provisions Involved

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title;

(g) a violation of section 5322 of title 31, United States Code (dealing with the reporting of currency transactions);

(h) any felony violation of sections 2511 and 2512 (relating to interception and disclosure of certain communications and to certain intercepting devices) of this title;

(i) any felony violation of chapter 71 (relating to obscenity) of this title;

(j) any violation of section 1679a(c)(2) (relating to destruction of a natural gas pipeline) or subsection (i) or (n) of section 1472 (relating to aircraft piracy) of title 49, of the United States Code;

(k) any criminal violation of section 2778 of title 22 (relating to the Arms Export Control Act);

(l) the location of any fugitive from justice from an offense described in this section; or

(m) any conspiracy to commit any of the foregoing offenses;

(m)[1] any felony violation of sections 922 and 924 of title 18, United States Code (relating to firearms); and

(n) any violation of section 5861 of the Internal Revenue Code of 1986 (relating to firearms).

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(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

(3) Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure) may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant, in conformity with section 2518 of this title, an order authorizing or approving the interception of electronic communications by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of any Federal felony.

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18 U.S.C. Section 2517.
Authorization for disclosure and use of intercepted wire, oral, or electronic communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

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(5) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Section 2518.
Procedure for interception of wire, oral, or electronic communications

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and competent statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or

the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

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(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that-

> **(a)** there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;
>
> **(b)** there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
>
> **(c)** normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;
>
> **(d)** except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

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(4) Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify-

> **(a)** the identity of the person, if known, whose communications are to be intercepted;
>
> **(b)** the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;
>
> **(c)** a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;
>
> **(d)** the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and
>
> **(e)** the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire, oral, or electronic communication under this chapter shall, upon request of the applicant, direct that a provider of wire or electronic communication service, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider, landlord, custodian, or person is according the person whose communications are to be intercepted. Any provider of wire or electronic communication service, landlord, custodian or other person

furnishing such facilities or technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing facilities or assistance.

(5) No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Such thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception under this chapter may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

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(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that-

(a) an emergency situation exists that involves-

(i) immediate danger of death or serious physical injury to any person,

(ii) conspiratorial activities threatening the national security interest, or

(iii) conspiratorial activities characteristic of organized crime,

that requires a wire, oral, or electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire, oral, or electronic communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application

for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

(9) The contents of any wire, oral, or electronic communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy

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of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that-

(i) the communication was unlawfully intercepted;
(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

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(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

(c) The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications.

(11) The requirements of subsections (1)(b)(ii) and (3)(d) of this section relating to the specification of the facilities from which, or the place where, the communication is to be intercepted do not apply if-

(a) in the case of an application with respect to the interception of an oral communication-

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted; and

(iii) the judge finds that such specification is not practical; and

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(b) in the case of an application with respect to a wire or electronic communication-

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing of a purpose, on the part of that person, to thwart interception by changing facilities; and

(iii) the judge finds that such purpose has been adequately shown.

(12) An interception of a communication under an order with respect to which the requirements of subsections (1)(b)(ii) and (3)(d) of this section do not apply by reason of subsection (11) shall not begin until the facilities from which, or the place where, the communication is to be intercepted is ascertained by the person implementing the interception order. A provider of wire or electronic communications service that has received an order as provided for in subsection (11)(b) may move the court to modify or quash the order on the ground that its assistance with respect to the interception cannot be performed in a timely or reasonable fashion. The court, upon notice to the government, shall decide such a motion expeditiously.

Appendix F
Excerpts from the Supporting Documentation for Application for Original Eavesdropping Warrant of August 2, 1985

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

In the Matter

of

The secretion of videotape recording devices to visually monitor and tape certain persons and the placement of eavesdropping devices to overhear and record certain communications occurring within office Suite 229 occupied by PROSPECT PETROLEUM, INC., NO BRAND PETROLEUM, INC., and SNUG HARBOR FUEL CORP., located at 445 Broadhollow Road, Melville, Suffolk County, New York.

STATE OF NEW YORK)
) ss.:
COUNTY OF SUFFOLK)

PAUL MURPHY, being duly sworn, deposes and says:

1. I am a Senior Excise Tax Investigator with the New York State Department of Taxation and Finance, whose duties include the enforcement of New York State Penal Law statutes and New York State Tax Law criminal statutes relating to the theft of motor fuel taxes (Article 12A, New York State Tax Law) and sales taxes (Article 28 and 29, New York State Tax Law). In that capacity, for the last 18 years I have conducted criminal investigations relating to tax evasion schemes involving cigarettes and motor fuel in which I have utilized informants, executed search warrants, conducted surveillances and testified as an expert witness at both grand jury and trial

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proceedings. For the last three years, my sole responsibility has been the investigation of gasoline "bootleggers". My current duties include membership in the Long Island gas and oil industry organized crime task force (hereafter referred to as "Long Island Task Force" or "Task Force", see Paragraph #4).

2. This affidavit is submitted in support of the annexed application of New York State Attorney General Robert Abrams pursuant to CPL Section 700.20 for an eavesdropping warrant authorizing the installation of mechanical eavesdropping (bugging) and recording devices, and pursuant to CPL Article 690 authorizing the installation and use of videotape recording devices within office suite #229, occupied by SHELDON LEVINE, a/k/a SHELLY, conducting business as PROSPECT PETROLEUM, INC., NO BRAND PETROLEUM, INC., and SNUG HARBOR FUEL CORP.*, located at 445 Broadhollow Road, Melville, Suffolk County, New York, and authorizing the interception and recording of certain oral communications and videotaping and recording the physical activities of SHELDON LEVINE, a/k/a SHELLY; Robert Helf; John Armstrong, a/k/a Jack; Gerald Friedberg, a/k/a Jerry; Gerald Teich, a/k/a Jerry; Vincent Ragone; Joseph Galizia, a/k/a Joe Glitz, a/k/a Mr. Glick; Albert Tumbiolo, a/k/a Mr. T.; Anthony Zummo, a/k/a Tony; Frank Uzdavines; James Miliante; Igor (last name unknown) #1, believed to be Igor Roizman; Igor (last name unknown) #2, believed to be Igor Perotsky; Fazli Ozen, a/k/a Frank; Turgot Ozen, a/k/a Turk; Ismet Kipchek; George Kryssing; Erdogan Batir; Thomas Berg;

* As set forth below, investigation indicates that in the past LEVINE has from time to time changed the corporate name under which he conducts his gasoline distribution business. For the sake of simplicity, future references in this affidavit to the physical plant where LEVINE conducts his petroleum business, will be to "NO BRAND/PROSPECT".

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Edward Melnick; Mehmet Babakurban, their agents, co-conspirators, and others as yet unknown within that location, which evidences the ongoing crimes of GRAND LARCENY IN THE SECOND AND THIRD DEGREES, FALSIFYING BUSINESS RECORDS IN THE FIRST DEGREE, and CONSPIRACY to commit these crimes, being committed by these individuals, their agents, co-conspirators and others as yet unknown.

3. The information set forth in this affidavit is based upon your deponent's investigation and, where indicated, upon information and belief, the source being facts provided by other members of the Long Island Task Force based upon their investigation.

4. This application is made in connection with an investigation that your deponent and approximately 20 other full-time investigators assigned to a joint task force comprised of agents and/or prosecutors from the Office of the New York State Attorney General; Nassau and Suffolk County District Attorney's offices; the Offices of the U.S. Attorney, Eastern District of New York, and the Organized Crime Strike Force, Eastern District of New York; the New York State Department of Taxation and Finance, Nassau and Suffolk County Police Departments, the Federal Bureau of Investigation, and the Internal Revenue Service ("the Task Force" or "Long Island Task Force") have been conducting into the distribution of gasoline and fuel oil on Long Island, and in particular the impact and influence that organized crime has exerted on that industry on Long Island over the last several years. The Task Force, housed in Smithtown, New York, has been in existence since the fall of 1982. Its efforts have resulted in the prosecution and conviction of several firms and individuals engaged in the distribution of "bootleg" gasoline in the Long

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Island region, in both federal and state courts, for a variety of crimes, including mail and wire fraud, tax evasion, grand larceny, offering a false instrument for filing, and bribery of a witness.

5. Evidence developed through a variety of investigative means by Long Island Task Force members, including interviews with wholesalers, distributors, and retailers of gasoline, analyses of public records, surveillances, intelligence information gathered through confidential informants, and statements made to investigators by convicted gasoline bootleggers has established that, for approximately the last five years, some 20 unscrupulous New York Metropolitan area gasoline distributors, along with several members and associates of at least three of the five major New York organized crime families, specifically the Colombo, Luchese, and Genovese La Cosa Nostra ("LCN") families, have engaged in a widespread, well-organized scheme to evade the payment of federal, state and local taxes that are imposed on motor fuel products. The motor fuel products which they ultimately distribute through retail gas stations is commonly referred to as "bootleg" gasoline.

6. Investigation indicates that these evasion schemes operate in at least nine states and that total lost revenues approach one billion dollars per year. In April, 1984, the nonpayments in New York alone were estimated by Governor Cuomo's industry/government task force to be at least $90 million per year. Several gas distributors and known organized crime figures on Long Island, which consumes more than one-fifth of the gasoline sold in New York State, have been identified by the Task Force as key figures in these tax evasion schemes. Notwithstanding several attempts by the New York State Legislature, as set forth below, to help eliminate the sale of "bootleg" gasoline, and prevent the proliferation of such

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evasion schemes, the problem continues to accelerate, right up until the present.

Motor Fuel Taxes

7. New York State motor fuel excise taxes are imposed under Article 12A of the Tax Law of the State of New York, which levies a tax of eight cents per gallon of motor fuel sold by a distributor within the State of New York. The tax becomes nine cents per gallon if the gasoline sold is leaded gasoline and the sale takes place in a city within the State of New York with a population of one million (1,000,000) or more people.

8. New York State sales taxes are imposed under Articles 28 and 29 of the Tax Law of the State of New York, which levy a tax of four percent (4%) upon sales taking place in the State of New York, as well as a one-fourth percent (1/4%) sales tax for the metropolitan commuter transportation district. In addition, each county or municipality in the State of New York can impose its own sales tax upon sales taking place within that county or municipality. The total sum of these taxes are paid over to the State of New York, and then distributed by the State to the various counties. Each county, or as the case may be, the City of New York, have their own sales tax rate so the total percentage of sales taxes varies depending on the location of the sale. . . .

. . . made by me on June 4, 1985, and June 20, 1985, at these premises.

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135. From the facts set forth in Paragraphs 21 through 133 above, there is probable cause to believe that SHELDON LEVINE, a/k/a SHELLY; Robert Helf; John Armstrong, a/k/a Jack; Gerald Friedberg, a/k/a Jerry; Gerald Teich, a/k/a Jerry; Vincent Ragone; Joseph Galizia, a/k/a Joe Glitz, a/k/a Mr. Glick; Albert Tumbiolo, a/k/a Mr. T.; Anthony Zummo, a/k/a Tony; Frank Uzdavines; James Miliante; Igor (last name unknown) #1 (believed to be Igor Roizman); Igor (last name unknown) #2 (believed to be Igor Perotsky); Fazli Ozen, a/k/a Frank; Turgot Ozen, a/k/a Turk; Ismet Kipchek; George Kryssing; Erdogan Batir; Thomas Berg; Edward Melnick; Mehmet Babakurban; their agents, co-conspirators, and others as yet unknown are engaging in the crimes of GRAND LARCENY IN THE SECOND AND THIRD DEGREES, FALSIFYING BUSINESS RECORDS IN THE FIRST DEGREE, and CONSPIRACY to commit said crimes, and that these individuals have utilized, are utilizing, and will continue to utilize the offices of NO BRAND/PROSPECT PETROLEUM at 445 Broadhollow Road, Suite 229, Melville, Suffolk County, New York, to discuss, plan, and further the commission of these crimes. There is probable cause to believe that evidence of said criminal activity can be secured by means of court-authorized electronic surveillance inside said premises; specifically by videotaping the activities of the aforementioned individuals and intercepting oral communications of said individuals within said premises.

136. The objectives of this investigation include obtaining sufficient evidence to establish the roles and identities of the various persons and business entities engaged in the commission of the aforementioned crimes, including LEVINE and the others mentioned in paragraph 135, as well as their co-conspirators, accomplices, and agents whose identities are as yet unknown, and in particular the roles of the respective members

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and associates of various organized crime families including the Luchese, Genovese, and Colombo LCN families. Specifically, these would be conversations in which LEVINE and others discuss, plan, and execute various schemes to evade the payment of federal, state and local taxes imposed on motor fuels including the ordering, distribution, sale and delivery of gasoline, discussions concerning the preparation of false and/or fraudulent invoices, bills of lading and sales receipts, and conversations concerning the distribution of revenues derived from these illegal activities.

137. Conventional means of investigation have been and continue to be employed in this investigation in an effort to obtain the evidence needed to successfully prosecute LEVINE and his co-conspirators, but have failed or appear unlikely to succeed if tried or pursued further. Physical surveillances cannot produce the quality and quantity of evidence required to identify all co-conspirators and support prosecutions that will lead to convictions. The fact that meetings take place among those involved in these on-going crimes is known, but the purpose of any particular meeting and the respective roles of each individual conspirator is unknown. Mechanical eavesdropping is necessary to establish the nature and purpose of each meeting and the roles of each individual, particularly those higher up . . .

Appendix G
Order of November 8, 1985
Amending Eavesdropping Warrant

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

IN THE MATTER

OF

THE SECRETION AND THE PLACEMENT OF EAVESDROPPING DEVICES TO OVERHEAR AND RECORD CERTAIN COMMUNICATIONS OCCURRING WITHIN OFFICE SUITE 229 OCCUPIED BY PROSPECT PETROLEUM, INC., NO BRAND PETROLEUM, INC., AND SNUG HARBOR FUEL CORP., LOCATED AT 445 BROADHOLLOW ROAD, MELVILLE, SUFFOLK COUNTY, NEW YORK.

It appearing from the annexed affidavits of Robert Abrams, Attorney General of the State of New York, and Laura A. Brevetti, Assistant Attorney-in-Charge, Organized Crime Strike Force for the Eastern District of New York, said affidavits being incorporated herein by reference as part hereof, and from the above-captioned eavesdropping warrant, its amendments and extensions, which are also incorporated herein as a part hereof, and from my own supervision of the execution of the eavesdropping warrant, as the issuing judge of that warrant, that during the authorized period of oral interception conversations were intercepted which related to federal crimes not specified in the interception orders, including, but not limited to, violations of Title 18, United States Code, Sections 1962 and 1963, relating to racketeer influenced and corruption organizations; and Title 18, United States Code, Sections 1503, 1510 and 1512, relating to obstruction of the due administration of justice, a criminal investigation and tampering with a witness;

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Title 18, United States Code, Section 1341, relating to mail fraud; Title 18, United States Code, Section 1343, relating to wire fraud; and Title 18, United States Code, Sections 2314 and 2315, relating to interstate transportation, receipt and sale of stolen property; Title 18, United States Code, Sections 1621, 1622 and 1623 relating to perjury; Title 18, United States Code, Section 371, relating to conspiracy; Title 26, United States Code, Sections 7201, 7202, 7203 and 7206(1) and (2), relating to violations of the tax laws; and Title 31, United States Code, relating to violations under the Currency and Foreign Transactions Reporting Act, and it further

APPEARING, from the above-described affidavits and applications that the communications relating to the offenses set forth in the preceding paragraph were intercepted as evidence of designated offenses in the Court's orders, or incidentally and in good faith by the monitoring agents while engaged in intercepting oral communications in the manner authorized by this Court's orders and with Article 700 of the Criminal Procedure Law of the State of New York and of Title 18, United States Code, Chapter 119, and accordingly were "otherwise intercepted" in accordance with these federal and state provisions, and it further

APPEARING, from the above-described affidavits and applications that the application for this order has been made as soon as practicable, it is hereby

ORDERED, that the above-captioned eavesdropping warrant, as extended and amended, is further amended pursuant to Title 18, United States Code, Section 2517(5), to permit the use in any court of the United States and in any federal grand jury proceeding of all oral communications intercepted within the above-captioned location and relating to any federal crimes, including, but not limited to, the federal crimes enumerated

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above, and any evidence derived therefrom, and to permit any person who has received by any means authorized by Chapter 119 of the United States Code and by the New York Criminal Procedure Law, any information concerning any oral communication intercepted within the above-captioned location and relating to any federal crimes, including, but not limited to, the federal crimes enumerated above, or evidence derived therefrom, to disclose the contents of said communications or derivative evidence while giving testimony under oath or affirmation in any criminal proceeding held under the authority of the United States, and it is further

ORDERED, that the above-captioned eavesdropping warrant, as extended and amended, is further amended pursuant to Section 700.65(4) of the Criminal Procedure Law of the State of New York to permit the use in any court of the United States and in any federal grand jury of all conversations which were not otherwise sought and which constitute evidence of any federal crimes, including, but not limited to, the federal crimes enumerated above, and any evidence derived therefrom, and to permit any person who has received by any means authorized by Chapter 119 of the United States Code and by the New York Criminal Procedure Law, any information concerning any oral communication intercepted within the above-captioned location and relating to federal crimes, including, but not limited to, the federal crimes enumerated above, or evidence derived therefrom, to disclose the contents of said communications or that derivative evidence while giving testimony under oath or affirmation in any criminal proceeding under the authority of the United States, and it is further

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ORDERED, that this order and the accompanying application and affidavits, together with any attachments, be sealed until further order of this Court.

Dated: 11-8-85

/s/_____
KENNETH K. ROHL
JUDGE
COUNTY COURT
COUNTY OF SUFFOLK

No. 89-1140

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

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QUESTIONS PRESENTED

1. When a state court has properly authorized electronic surveillance of communications concerning state offenses listed in Title III of the Omnibus Crime Control and Safe Streets Act, may that court, under 18 U.S.C. 2517(5), authorize the use in grand jury proceedings of communications intercepted during the surveillance that relate to federal offenses not listed in Title III?

2. Was the district court required to make an additional in camera review of the surveillance order and supporting affidavits in this case?

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1140

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 889 F.2d 384. The judgment of the district court (Pet. App. 18a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a-14a) was entered on September 18, 1989. On December 14, 1989, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including January 16, 1990, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, who was subpoenaed to testify before a grand jury, contends that intercepted communications were used in the grand jury proceedings in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520.

1. a. In 1982, a task force consisting of representatives of local, state, and federal law enforcement agencies was created to investigate the influence of organized crime on the distribution of fuel oil and gasoline on Long Island. Pet. App. 3a. On August 2, 1985, Suffolk County Judge Kenneth K. Rohl, acting at the request of the Attorney General of New York and on the basis of a supporting affidavit of a task force investigator, issued an order authorizing state and federal law enforcement officials to conduct electronic surveillance of the offices of Sheldon Levine in Melville, New York.[1] Levine and others, known and unknown, were suspected of committing grand larceny, falsification of business records, and conspiracy to commit those crimes, in violation of New York penal law. *Ibid.* The surveillance order authorized the interception and recording of oral communications and the videotaping and recording of physical activities relating to the state crimes. *Id.* at 4a. According to the supporting affidavit, it was anticipated that intercepted conversations would relate not only to those offenses, but also to schemes to evade the payment of local, state, and federal taxes imposed on motor fuels. *Id.* at 42a.

In November 1985, the Attorney General of New York and the Assistant Attorney-in-Charge of the

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[1] The order was issued pursuant to the New York eavesdropping statute, N.Y. Crim. Proc. Law § 700 (McKinney 1984 & 1989 Supp.)

Justice Department's Organized Crime Strike Force for the Eastern District of New York, both of whom were members of the task force, submitted affidavits to Judge Rohl stating that surveillance already conducted had revealed evidence of federal crimes, including federal tax offenses. They requested amendment of the August 2 order to permit use of that evidence before a federal grand jury investigating, inter alia, violations of federal tax laws. The request was based on 18 U.S.C. 2517(5), which provides that when a law enforcement officer, while engaged in the authorized interception of communications, intercepts communications "relating to offenses other than those specified in the order of authorization or approval," the contents and evidence derived therefrom may, with judicial approval, be disclosed in judicial proceedings. Pet. App. 4a.

On November 8, 1985, Judge Rohl granted the request and amended the August 2 order to permit all intercepted oral communications relating to federal crimes to be used in federal grand jury proceedings or in any court of the United States. The amended order specifically listed various federal crimes, including violations of the tax laws, 26 U.S.C. 7201, 7202, 7203 and 7206(1) and (2). Pet. App. 4a-5a.[2]

Judge Rohl subsequently signed extensions of the surveillance order on November 22 and December 20,

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[2] The other federal crimes listed were violations of 18 U.S.C. 1962 and 1963 (racketeer influenced and corrupt organizations); 18 U.S.C. 1503, 1510 and 1512 (obstruction of justice, obstruction of a criminal investigation, and tampering with a witness); 18 U.S.C. 1341 (mail fraud); 18 U.S.C. 2314 and 2315 (interstate transportation, receipt, and sale of stolen property); 18 U.S.C. 1621-1623 (perjury); 18 U.S.C. 371 (conspiracy); and the Currency and Foreign Transactions Reporting Act, 31 U.S.C. 5315.

1985, again authorizing interception of communications relating to the three state crimes supporting the original surveillance order. The interceptions ended on January 10, 1986. *United States* v. *Levine*, 690 F. Supp. 1165, 1168 (E.D.N.Y. 1988).

b. Petitioner's name was revealed during the surveillance. On July 29, 1988, petitioner was served with a subpoena directing him to appear before a federal grand jury. He moved to quash the subpoena and suppress evidence, contending that the order and extension orders authorizing surveillance of Levine's office were facially invalid. C.A. App. 3-21. The court, per Judge Leonard D. Wexler, denied the motion on August 4, 1989. Pet. App. 15a-17a. In its memorandum opinion, the court cited the opinion of Judge Eugene Nickerson in *United States* v. *Levine*, which, in the prosecution of the target, Sheldon Levine, held the surveillance valid in all respects. Judge Wexler recognized that he was not bound by the *Levine* decision, but he found "Judge Nickerson's reasoning both compelling and correct." Pet. App. 17a.

Petitioner appeared before the grand jury on August 16 and refused to testify, claiming that the electronic surveillance was illegal. After a hearing the same day, the district court ascertained that petitioner understood the consequences of his refusal to testify, cited him for civil contempt, and committed him to the custody of the Marshal until he obeyed the order. Pet. App. 5a-6a, 18a-19a.

2. The court of appeals affirmed the judgment of civil contempt. Pet. App. 1a-12a. It first rejected petitioner's argument that he was entitled to in camera review of the validity of the surveillance orders before he could be compelled to testify. Noting that the district court had been furnished with Judge Rohl's surveillance orders and the supporting affida-

vits and had afforded petitioner an opportunity to file papers in support of his motion to quash the subpoena, the court concluded that the district court had fully considered petitioner's contentions and that an additional in camera review was unnecessary. *Id.* at 6a-7a.

The court of appeals next rejected petitioner's contention that the district court's authorization orders were facially invalid to the extent they permitted use of communications in connection with federal tax offenses. Relying on the legislative history of 18 U.S.C. 2517(5) (see S. Rep. No. 1097, 90th Cong., 2d Sess. 100 (1968)), decisions of other courts of appeals (see *United States* v. *McKinnon*, 721 F.2d 19, 22-23 (1st Cir. 1983); *United States* v. *Pacheco*, 489 F.2d 554, 564 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975)), and the district court's decision in *United States* v. *Levine* (690 F. Supp. at 1169-1171), the court of appeals held that an amended order may authorize use of intercepted communications relating to federal offenses that could not in themselves be the basis for a surveillance order, so long as the order was sought in good faith and not as a subterfuge and the communications were incidentally intercepted during the course of a lawfully executed order. Pet. App. 7a-11a. The court found that test satisfied here. It noted that petitioner did not charge federal officials with instigating the authorization application "largely to secure evidence of violations of federal tax crimes or that there was otherwise bad faith or deception on their part," and it found "no indication, nor even any assertion by [petitioner], that the disclosures regarding federal crimes were anything other than an incidental by-product of the first surveillance." *Id.* at 9a.

Finally, the court of appeals held that federal law enforcement officials were not barred from applying to Judge Rohl, a state judge, for authorization to use intercepted communications as evidence of federal crimes. Pet. App. 11a-12a. The court pointed out that Section 2517(5) permits a "judge of competent jurisdiction" to amend a surveillance order and that Judge Rohl was such a judge, since the definition of the quoted term in 18 U.S.C. 2510(9) includes "a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications." Pet. App. 12a. The court further observed that "[i]t would make little sense, and would serve no public policy, to deny federal law enforcement agencies the use of evidence that has been serendipitously discovered in the course of surveillance conducted according to law." *Ibid.*

ARGUMENT

The court of appeals correctly rejected petitioner's challenges to the grand jury's use of lawfully intercepted communications concerning his involvement in federal tax offenses. Its ruling does not conflict with any decision of this Court or another court of appeals. Review by this Court, therefore, is not warranted.

1. a. The interception of wire, oral, and electronic communications is regulated by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at Chapter 119 of Title 18 of the United States Code, 18 U.S.C. 2510-2520. Section 2511 generally prohibits the interception and disclosure of such communications. Under Section 2515, if a wire or oral communication has been intercepted in violation

of Title III, "no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof."

Title III does permit interception and use of wire or oral communications under certain circumstances. Section 2516 provides that a federal or state "judge of competent jurisdiction" may authorize interception of such communications, upon an application authorized by any of certain state and federal officials, if the interception may provide evidence of certain designated offenses. As petitioner correctly points out (Pet. 12-13), federal tax offenses are not among the designated offenses on which an initial authorization or approval order may be based.

Section 2517 governs the disclosure and use of oral or wire communications that are lawfully intercepted pursuant to a proper authorization order. Of particular relevance here, Section 2517(5), which authorizes use of lawfully intercepted communications relating to "offenses other than those specified in the order of authorization or approval," provides that such evidence may be used in grand jury or judicial proceedings if a judge of competent jurisdiction finds that "the contents were otherwise intercepted in accordance with the provisions of this chapter." A witness who refuses to testify may defend against charges of civil contempt by showing that he was the victim of illegal electronic surveillance and that questions put to him are based on that surveillance. *Gelbard* v. *United States*, 408 U.S. 41 (1972).

b. Petitioner argues (Pet. 13-18) that the court of appeals erroneously held that "under Section 2517,

a Court may permit electronic surveillance of *any* communications, to gather evidence of any crimes, even those which are not Title III 'designated offenses,' including the investigation of Federal excise taxes" (Pet. 13). Petitioner mischaracterizes the holding of the court of appeals. The issue it resolved was "whether an amended order can authorize *use* of communications revealing evidence of crimes that could not have been investigated under an original order." Pet. App. 8a (emphasis added). Thus, the court did not hold that Section 2517(5) allows a court to authorize future surveillance to obtain evidence of nondesignated offenses. It held only that communications that have already been lawfully intercepted in surveillance directed to designated offenses may, with court approval, be used in proceedings concerning other offenses.[3]

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[3] In an affirmation filed in the district court, petitioner's counsel stated: "On or about November 21, 1985 and other dates yet unknown, Levine was intercepted allegedly having conversations with [petitioner], during which conversations, the evasion of Federal excise taxes was discussed." C.A. App. 8. Judge Rohl's November 8, 1985, order authorizing the use of intercepted conversations relating to other offenses (Pet. App. 43a-46a) did not by its terms purport to authorize use of such evidence subsequently intercepted. However, Judge Rohl implicitly authorized and approved use of later interceptions of such evidence when, having been informed that such interceptions had previously taken place, he issued orders extending the original electronic surveillance order. See *United States* v. *Van Horn*, 789 F.2d 1492, 1503-1504 (11th Cir.), cert. denied, 479 U.S. 854 (1986); *United States* v. *McKinnon*, 721 F.2d 19, 23-24 (1st Cir. 1983); *United States* v. *Johnson*, 696 F.2d 115, 125 (D.C. Cir. 1982); *United States* v. *Masciarelli*, 558 F.2d 1064, 1067-1069 (2d Cir. 1977); *United States* v. *Marion*, 535 F.2d 697, 703 (2d Cir. 1976).

This holding was correct. Section 2517(5) provides (emphasis added):

> When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to *offenses other than those specified in the order of authorization or approval*, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

The phrase "offenses other than those specified in the order of authorization or approval" is not limited to those offenses that are designated in Section 2516 and therefore would support an order authorizing surveillance in the first instance. Thus, the text of Section 2517(5) permits the use of lawfully intercepted communications concerning any other offense, as long as other safeguards are satisfied.

Petitioner contends (Pet. 14) that a limitation to offenses designated in Section 2516 is implicit in the requirement in Section 2517(5) that "the contents were otherwise intercepted in accordance with the provisions of this chapter." This contention is without merit. Title III does not flatly prohibit all interception (and subsequent use) of communications unrelated to designated offenses. Rather, it requires surveillance to be "conducted in such a way as to *mini-*

mize the interception of communications not otherwise subject to interception under this chapter." 18 U.S.C. 2518(5) (emphasis added); see *Scott* v. *United States*, 436 U.S. 128, 140 (1978). Thus, as long as the interception of communications concerning designated offenses was duly authorized and the minimization requirement has been met, the incidental interception of communications relating to nondesignated offenses is consistent with Title III. Furthermore, the legislative history confirms that Congress did not intend the statutory text to impose the unexpressed limitation petitioner urges. As the court of appeals observed (Pet. App. 8a), the Senate Report on Title III states that the other offenses referred to in Section 2517(5) "need not be designated offenses." S. Rep. No. 1097, *supra*, at 100.

Petitioner cites no judicial decision adopting his interpretation of Section 2517(5), and we are aware of none. In fact, consistent with the ruling below, two other courts of appeals have held that a judge may authorize the use of evidence of nondesignated offenses that is intercepted in the course of authorized surveillance. *United States* v. *McKinnon*, 721 F.2d 19, 21 & n.1 (1st Cir. 1983); *United States* v. *Pacheco*, 489 F.2d 554, 564 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975).

Contrary to petitioner's assertion (Pet. 17), this construction of the statute does not sanction general searches or violate privacy rights Congress sought to protect under Title III. As the court of appeals pointed out, Congress accommodated privacy concerns not by imposing an absolute statutory prohibition on the use of lawfully intercepted communications in circumstances such as these, but by requiring judicial scrutiny to permit the use of evidence of other offenses "only upon 'a showing that the original order

was lawfully obtained, that it was sought in good faith and not as [a] subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order'." Pet. App. 8a-9a (quoting S. Rep. No. 1097, *supra*, at 100). See also *United States* v. *McKinnon*, 721 F.2d at 22; *United States* v. *Angiulo*, 847 F.2d 956, 980 (1st Cir. 1988).[4]

c. Petitioner further asserts (Pet. 15-18) that the interception of evidence of other offenses in this case was not in accord with the standard indicated by the Senate Report. In particular, he argues that the interceptions were not "incidental" because they were not unanticipated. But petitioner cites no authority holding that the interception of "other offense" evidence must be unanticipated or inadvertent.[5] Indeed,

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[4] Petitioner maintains (Pet. 18-19) that a state judge may not authorize surveillance to obtain evidence of federal crimes if a federal judge could not authorize the surveillance. We agree with this proposition, but it is immaterial here. Judge Rohl's order did not authorize anything that a federal judge could not have authorized in connection with surveillance under his supervision. Judge Rohl, in compliance with Title III, authorized use of previously intercepted evidence of federal crimes, not interception of such evidence in the first instance.

[5] The Second Circuit previously expressed the view in *United States* v. *Marion*, 535 F.2d 697, 707 & n.20 (1976), that where state and federal investigators jointly pursue an investigation from its inception, separate surveillance authorization orders would be required, "[i]nasmuch as the interception of communications relating to different federal offenses would not * * * be incidental." Relying solely on this passage in *Marion*, petitioner argues (Pet. 19-20) that separate federal and state surveillance "applications" were required in this case. As the court below pointed out (Pet. App. 10a-11a), however, the quoted passage was dictum because

the only prior decision to resolve the question, *United States* v. *McKinnon*, 721 F.2d at 22-23, held that an interception need not be unanticipated to be incidental. As the First Circuit reasoned, "[e]vidence of crimes other than those authorized in a wiretap warrant are intercepted 'incidentally' when they are the byproduct of a bona fide investigation of crimes specified in a valid warrant. Congress did not intend that a suspect be insulated from evidence of one of his illegal activities * * * merely because law enforcement agents are aware of his diversified criminal portfolio." *Id.* at 23. Thus, there is no merit to petitioner's assertion that interceptions must be unanticipated or inadvertent in order to be incidental.

As the court of appeals pointed out (Pet. App. 9a-10a), in this case, "[w]hile it was of course possible that the surveillance relating to state crimes would reveal evidence of federal crimes—motor fuel is subject to both federal and state taxation—there is no indication, nor even any assertion by [petitioner], that the disclosures regarding federal crimes were anything other than an incidental by-product of the first surveillance." Especially in these circumstances, Judge Rohl properly approved use of the evidence of federal crimes.[6]

Marion did not involve an investigation conducted jointly from its inception. In fact, the court in *Marion* upheld a Section 2517(5) approval order that was implicit in the state judge's renewal of a surveillance order. In any event, any intracircuit conflict between the decision below and the Second Circuit's prior decision in *Marion* would not warrant resolution by this Court.

[6] Petitioner does not contend that the initial surveillance in this case was a subterfuge aimed at obtaining evidence of federal crimes, and the record in fact refutes any such suggestion. The State had a substantial interest in pursuing

2. Petitioner further contends (Pet. 21-24) that the district court erroneously declined to conduct an in camera review of the facial validity of the surveillance orders. The court of appeals correctly found (Pet. App. 6a-7a) that Judge Wexler had fully considered petitioner's objections to the orders and that additional in camera review was not necessary.[7] This

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schemes such as Levine's: the affidavit supporting the initial authorization represented that New York was losing at least $90 million annually in state tax revenue from such schemes. Pet. App. 10a. In addition, the initial application and affidavit candidly informed Judge Rohl of the possibility that conversations relating to evasion of federal taxes would be discovered because of the close relationship between federal tax offenses and the enumerated state crimes. This candor indicates good faith and the absence of an intent to engage in a subterfuge. See *United States* v. *Levine*, 690 F. Supp. at 1170-1171. Moreover, the intercepted communications related to the enumerated state crimes as well as the federal tax offenses. See *United States* v. *Masciarelli*, 558 F.2d 1064, 1068 (2d Cir. 1977). Finally, based on the surveillance, a Suffolk County grand jury indicted Levine, charging him with 1004 violations of the New York penal law. Pet. App. 9a-10a; *United States* v. *Levine*, 690 F.2d at 1171. See *United States* v. *McKinnon*, 721 F.2d at 22; *United States* v. *Masciarelli*, 558 F.2d at 1069.

[7] We note that although courts have conducted reviews of the facial validity of surveillance orders at the behest of grand jury witnesses (see, *e.g.*, *United States* v. *Petito*, 671 F.2d 68, 74 (2d Cir.), cert. denied, 459 U.S. 824 (1982)), the legislative history of Title III suggests that a grand jury witness is not entitled to any review of the facial validity of court orders authorizing electronic surveillance. The Senate Report states (S. Rep. No. 1097, *supra*, at 106):

> Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury,

factual determination finds ample support in the record and does not warrant review by this Court.

As the court of appeals pointed out, Judge Wexler was provided with the text of Judge Rohl's authorizations and the supporting affidavits, and Judge Wexler afforded petitioner an opportunity to file papers in support of his position. Petitioner therefore had a greater opportunity to attempt to persuade the court than a mere in camera review would have afforded. Moreover, Judge Wexler's ruling indicates that he gave full consideration to the materials before him. While recognizing that he was not bound by Judge Nickerson's opinion in *Levine*, Judge Wexler found the reasoning of *Levine* to be "both compelling and correct." Pet. App. 17a. This conclusion indicates that Judge Wexler independently considered Judge Nickerson's determinations, which included resolution of the principal question raised by petitioner—*i.e.*, whether an order amending a surveillance order may permit use of evidence of communications relating to offenses that themselves would not support a surveillance order. *United States* v. *Levine*, 690 F. Supp. at 1169. Petitioner's claim that the district court declined to grant any review of the validity of the order is without merit.

> which is enforcible by an individual. (*Blue* v. *United States*, 384 U.S. 251 (1965).) There is no intent to change this rule. It is the intent of the provision only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding.

If, as this passage indicates, Title III was not intended to confer a right on a grand jury witness to seek suppression in the context of the grand jury proceeding, it would follow that a grand jury witness is not entitled to a review of surveillance orders for that purpose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

IN THE

Supreme Court of the United States

October Term, 1989

IN RE: GRAND JURY SUBPOENA
SERVED ON JOHN DOE

JOHN DOE, A GRAND JURY WITNESS,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REASONS FOR GRANTING THE WRIT

I
THE SOLICITOR GENERAL HAS CLEARLY FOCUSED ON THE LEGAL DEFECT AND THE CONSTITUTIONAL THREAT OF THE SECOND CIRCUIT OPINION

The Solicitor General asserts that the Court of Appeals, in this first impression opinion, did not put its blanket imprimatur on court authorization of electronic surveillance of

any communications, even those which are not Title III 'designated' offenses (Res. 8).

Yet, by illogically mincing words and distorting basic legal concepts, the Solicitor General has underscored clearly the wholesale dismantling effects of the self-same Court of Appeals opinion upon Title III.

a) The Government Concedes That Interception of Communications For Federal Tax Offenses May Not Be Initially Authorized

The Solicitor General (Res. 7), as well as the Court of Appeals (C.A. App. 8a), has acknowledged that federal tax offenses are not among the Section 2516 designated offenses for which electronic surveillance can be authorized in any initial Title III order.

b) Interception First; Authorization Later Is Acceptable

However, The Solicitor General further asserts, the Court of Appeals opinion does approve the 'use' of the non-authorized interceptions of non-designated offenses so long as such interceptions were completed *prior* to authorization. (Res. 8).

Merely as an aside, the Solicitor General candidly recognizes (Res. 8, ftnote 3) that this proposition "implicitly authorizes and approved use of later interceptions of such evidence when, having been informed that such interceptions had previously taken place, (a court) issues orders extending the original electronic surveillance order."

Therein lies the rub. For in that desperate illogic, by approving the possibility of constitutional incursions, the Court of Appeals has approved the incursions themselves. These incursions totally emasculate Title III.

c) Nunc Pro Tunc Is Not New To The Law

It is, of course, true that Section 2517 of Title III, under carefully set forth restrictions, permits use of wire, oral, or

electronic communications relating to offenses other than those specified in an initial order of authorization.

But such use of unauthorized electronic interceptions can be subsequently approved by a court *only* when "the contents were otherwise intercepted in accordance with the provisions of this Chapter (Title III)" [2517(5)].

In other words, lack of prior authorization of certain offenses not specified in the authorizing order may be subsequently approved, nunc pro tunc, where the interception had been otherwise conducted in total conformity with all legal mandates of Title III save only for the existence of an initial authorization.

To underscore here the crystal clear intent of Congress, each of the five (5) sub-sections of disclosure or use enabling Section 2517, contain the Congressional admonition that electronic interceptions may be used or disclosed ONLY where such interceptions were obtained *by means authorized by this chapter.* (1)

In sub-section 5 of Section 2517, which specifically deals with the use of interceptions of communications *other* than those specified in an initial authorizing order - as here - Congress admonished not once, but twice, at both the beginning and at the end of the said sub-section *that the intercept MUST be obtained in the manner otherwise authorized by Title III.*

Congress never indicated, directly or indirectly, that non-designated offenses were at any time open to electronic interceptions.

Congress merely provided in Section 2517 sub 5 that during a lawfully authorized intercept aimed at certain specified designated offenses, interception of 'other' offenses, if all other criteria of Title III be met, might be approved nunc pro tunc.

d) Offenses For Which Interception Is Void Can Not Be Validated Nunc Pro Tunc

This concept of nunc pro tunc approval of that which is otherwise lawfully obtained, save only for the technical timing of its validation is academic.

Equally academic is the fact that what is void, what was never alive, and, thus, can not be revived or revitalized.

In this case, Congress specifically omitted federal tax offenses from the list of designated offenses for which electronic intercepts might be utilized.

Initial orders to intercept evidence of federal tax offenses are impermissible. Secondary orders, which the very language of Section 2517 (5) requires to be "otherwise lawfully obtained" can not, retroactively, be more alive, more susceptible of being alive than its non-existent progenitor.

The Court of Appeals has fashioned, from bits and pieces, a retroactive method of revitalizing something that never existed in the first place. This Frankenstein opinion, however, if permitted to stand virtually shall destroy the very fabric of the protections of Title III which, in the words of Senator McClellan, one of the main proponents of the legislation:

> "***(Title 3) is not only a bill to aid law enforcement officials in detecting crime and apprehending the criminals but it was also a bill to protect the private citizen from invasion of his privacy.
>
> "***I hope, too, that our judiciary, even with crowded dockets, is always taking the necessary time to examine and pass on all Applications thoroughly. The part that they must play in scrutinizing and questioning these Applications as well as requiring strickt adherence to the statutory standards can not be over emphysized***."

II
THE COURT OF APPEALS OPINION PERMITTING RETROACTIVE AUTHORIZATION OF NON-DESIGNATED OFFENSES VIRTUALLY ABROGATES TITLE III

Nowhere has the Court of Appeals, the Solicitor General, The Court at Nisi Prius, the Department of Justice pointed to a single word of Title III which permits or even purports to permit the initial authorization for or the subsequent use of electronic surveillance to investigate Federal tax offenses.

The reason that no one, nowhere cites for this Court a single word of statutory support for the use of electronic surveillance to investigate federal tax offenses is that there are nonesuch.

a) Lacking Statutory Authority, The Government Must Rely Only On Legislative History

Lacking any statutory language whatsoever, all who support the retro-authorizing order herein are forced to cite the legislative history, the Senate Report, which accompanied Title III, to torture a semblance of an argument.

The Legislative history is not the statute.

The writer of the Legislative history is not Congress.

The Legislative history is *obiter dictum*, it is spoken *ex cathedra*. It does not have the binding effect that the specific and clear language of that statute has.

b) The Court of Appeals Has Fashioned An Apparent Exception

All who would argue in favor of the "apparent exception" fashioned by the Court of Appeals, to wit, "the Senate Report accompanying Section 2517(5) states that 'other' offenses' under that section 'need not be designated offenses,'

an apparent exception**** (C.A. 8a) must argue around the plain language of the statute.

Nowhere does the statute make the slightest accommodation for the opinion of the Court of Appeals. Indeed, quite the contrary, Congress, when it authorized subsequent approval of communications relating to offenses other than those specified in the authorizing order, *twice* insisted that the communication *must* be otherwise intercepted in accordance with the provisions of this chapter [2517(5)].

While the Solicitor General asserts that "the legislative history confirms that Congress did not intend the statutory test to impose the unexpressed limitation petitioner urges (Res. 10), the statutory language clearly supports Petitioner.

c) Acceptance Of The Government's Argument Is Recognition Of The Death Of Title III

Surely Congress was aware of federal tax law offenses when it specifically omitted such offenses from the Section 2516 designated offense list.

To now permit a court even to approve use - not interception - but use of electronic surveillance for non-designated offenses previously obtained by law enforcement officers during an interception for other designated offenses means that any offense, designated or not, can be intercepted, merely depending upon the time of the intercept and the timing of the application for authorization.

d) Here The Non Authorized Offenses Were Clearly Anticipated

Evasions of federal taxes were not only anticipated herein, but were mentioned to the authorizing Judge, in the initial Application as potential offenses which would be overheard.

Notwithstanding the fore-knowledge of such potential interceptions, no authorizing order was executed because such was legally impermissible.

To permit the Joint Task Force herein to come back a short while later, and without giggling, suggest to the same Court that *now* there had been interceptions of 'other crimes' which had been 'otherwise' legally intercepted is to make a mockery of Title III and to insult the honest intelligence of the Court.

To permit this sort of gamesplaying in the name of the Justice System, in the interpretation of Congressional intent, is a travesty, plain and simple.

Respectfully Submitted,

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